Supreme Court, U. S.
FILED
SEP 24 1975
MICHAEL RODAK, JR., CLERK

No. 74-538

In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PETITIONER

v.

HENRY OGLE WATSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-538

UNITED STATES OF AMERICA, PETITIONER

v.

HENRY OGLE WATSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

I

THE ARREST

A. Respondent contends (Br. 13-15) that his arrest was not supported by probable cause. Respondent made an identical argument to the court of appeals, which properly rejected it (Pet. App. 4A-5A).

We submit that the contention that Inspector Barbarick lacked probable cause to arrest respondent is insubstantial. Respondent asserts (Br. 13) that

probable cause is absent because "the only information relative to criminal conduct comes through the mouth of the informant," who, respondent maintains, was not reliable. But Awad Khoury, Inspector Barbarick's informant, not only told Inspector Barbarick that respondent was in possession of credit cards stolen from the mails, but also obtained one of the cards and gave it to Barbarick (A. 13). Barbarick ascertained from the Bank of America that the card had been mailed but not received by the intended customer (*ibid*). Khoury had provided reliable information in the past (A. 51-53). Khoury's story admitted his own involvement in the use of the stolen credit cards and was thus against Khoury's penal interest. Finally, respondent was personally known to Barbarick as one who had previously engaged in mail theft; respondent had been apprehended for such an offense, although he was not prosecuted when he provided information that led to other convictions (A. 33, 45, 84-85).

It is thus beyond serious dispute that respondent's arrest was not based "solely on the hearsay report of an unidentified informant" (*United States* v. *Harris*, 403 U.S. 573, 576) or on a "casual rumor" (*Spinelli* v. *United States*, 393 U.S. 410, 416). Indeed, the information and credit card provided by Khoury to Barbarick on August 17, 1972, not only established probable cause, but were sufficient to send to the jury that charge of possession of material stolen from the mails (and thus sufficient in law to

support a conviction). *A fortiori*, they established probable cause for respondent's arrest.[1]

If the Court should accept respondent's argument that the information in the hands of Inspector Barbarick on August 17 did not establish probable cause to arrest respondent, then Barbarick could not, of course, have obtained a warrant. Under the analysis of the court of appeals, he therefore would have been at liberty to arrest respondent without a warrant on August 23, when Khoury gave the signal informing Barbarick that respondent was in possession of additional stolen credit cards (A. 17-18). This information would have established that respondent was committing an additional crime, and Barbarick would have been entitled to arrest him on the spot. *United States* v. *Weaklem*, 517 F.2d 70, 72 (C.A. 9) (distinguishing the instant case as resting solely upon the long delay between the acquisition of probable cause and respondent's arrest). See our brief at 19-20, n. 10.

B. Two cases decided after we filed our opening brief have held that warrantless arrests are proper whenever the arresting officers have probable cause to believe that a felony has been committed. Both cases reject the holding below that a warrant must be obtained during an interlude between acquisition of

---

[1] This transaction was made the basis of a separate count of the indictment, on which the jury acquitted respondent. Although that acquittal suggests the dangers of making premature arrests before gathering corroborating evidence, it does not demonstrate that the evidence gathered on August 17 was insufficient to establish probable cause.

probable cause and the arrest. See *United States* v. *Cantu*, C.A. 7, No. 74-2037, decided July 22, 1975 (two day interlude); *Bishop* v. *Wainwright*, 511 F. 2d 664, 667 (C.A. 5) (five day interlude).

II

THE CONSENT SEARCH

A. Our analysis of the consent issue is not affected by this Court's intervening decision in *Brown* v. *Illinois*, No. 73-6650, decided June 26, 1975. The inquiry required by *Schneckloth* v. *Bustamonte*, 412 U.S. 218, is a Fourth Amendment inquiry; an effective consent to search is dispositive of the Fourth Amendment interests of the consenter. We have argued that the *Schneckloth* standards are satisfactory to safeguard a consenter's legitimate Fourth Amendment interests. Thus the "fruit of the poisonous tree" analysis carried out in *Brown* adds little of value to the *Schneckloth* inquiry; *Brown* neither mentioned nor affects *Schneckloth*. See our opening brief at 35-38, nn. 20, 21.

Even to the extent a "fruits" analysis is important in determining the voluntariness of a consent, however, there are important differences between *Brown* and the instant case. There was no probable cause to arrest in *Brown*; it was a violation of the Fourth Amendment to arrest Brown at all, and that violation was exploited by the officers to yield incriminating evidence. By contrast, because there was probable cause to arrest respondent, the constitutional choice

is between arrest with a warrant and arrest without a warrant. The postal inspectors did not (indeed, could not) "exploit" the lack of a warrant to increase the probability that respondent would consent.[2] In *Brown* the violation was a *sine qua non* of Brown's confession; here, the violation of the Fourth Amendment (if arrest without a warrant is a violation) did not produce or cause respondent's consent. Moreover, in *Brown* the officers knew or should have known that their actions were unconstitutional; in the instant case the inspectors could not have anticipated that a court would fault their performance. We submit that *Brown* does not afford support to respondent.

B. Respondent relies upon cases such as *Bumper* v. *North Carolina*, 391 U.S. 543, in which the Court has held that a consent is ineffective if it is no more than submission to a claim of lawful authority to conduct the search. Contrary to respondent's assertion, respondent's arrest is not "tantamount to the assertion of lawful authority found coercive in *Bumper*" (Br. 17-18). The arresting inspectors did not inform respondent that they had the lawful authority to search his car, or that he was under some obligation to consent to a search. Quite the contrary, respondent knew that he need not give his consent (see our opening brief at 31-32 and n. 17). If respondent's arrest was illegal, that illegality did not

---

[2] We have argued (see opening brief at 35) that in some circumstances an arrest may make consent less likely. The same cannot be said of confessions.

affect his consent because he was not aware either of the lack of a warrant or that a warrant might be required. Unlike the case in *Bumper*, where the claim of right to make a search was communicated to the person who gave consent and was highly salient to the consent decision, the illegality of respondent's arrest was unknown to him. There is not the slightest indication in the record that respondent either knew or cared that the inspectors did not possess a warrant for his arrest. The officers asserted no claim of right; they practiced no intentional deception; the lack of a warrant had no effect upon respondent's decision to consent.[3]

For the foregoing reasons, and for the reasons set out in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1975.

---

[3] Two cases that have come to our attention after we filed our opening brief should be added to the cases at Br. 33, n. 18; all hold that the standards of *Schneckloth* govern consent given while in custody. See *United States* v. *Gavic*, C.A. 8, No. 74-1715, decided July 11, 1975, slip op. 9-10 (collecting cases); *Hayes* v. *Cady*, 500 F.2d 1212, 1214 (C.A. 7).

☆ U. S. GOVERNMENT PRINTING OFFICE: 1975 593258 37